THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RACHEL GEORGE,	)	
Employee	)	
	)	OEA Matter No. 1601-0050-16
v.	)	
	)	Date of Issuance: October 22, 2018
D.C. OFFICE OF THE	)	
ATTORNEY GENERAL,	)	
Agency	)	Michelle R. Harris, Esq.
	)	Administrative Judge

Rachel George, Employee, *Pro Se*[1]
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On May 24, 2016, Rachel George ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Office of the Attorney General's ("Agency" or "OAG") decision to terminate her from service for failing a Performance Improvement Plan (PIP). Employee's removal was effective April 25, 2016. On August 10, 2016, Agency filed its Answer to Employee's Petition for Appeal.

Following a failed attempt at mediation, I was assigned this matter on October 18, 2016. On October 27, 2016, I issued an Order Convening a Prehearing Conference for December 19, 2016. On, November 16, 2016, Employee filed a Motion to amend her Appeal. No response was filed by Agency, and upon consideration of the Motion, I hereby grant Employee's Motion. On November 21, 2016, Employee, by and through her counsel, filed a Consent Motion to Continue the Prehearing Conference, citing schedule conflicts and requested dates in late January 2017. On November 21, 2016, I issued an Order granting Employee's Motion and rescheduling the Prehearing Conference for January 30, 2017. On December 8, 2016, Agency filed a Consent Motion to Continue the Prehearing Conference indicating that more time was needed for discovery, and requested dates for March 2017. On December 12, 2016, I issued an Order granting Agency's Motion and rescheduling the Prehearing Conference for March 14, 2017. On February 14, 2017, the parties filed a Consent Motion to

[1] Employee was previously represented by two attorneys during the course of this matter. Her first attorney, Sara Safriet, Esq., withdrew her appearance on May 5, 2017. Her second attorney, William Dansie, Esq., withdrew his appearance on April 25, 2018, after the Evidentiary Hearing had been held in this matter.

Continue the Prehearing Conference due to ongoing discovery and depositions, and requested a new date in April 2017. On February 21, 2017, I issued an Order granting the Motion and rescheduling the Prehearing Conference for April 21, 2017. On April 11, 2017, Employee filed a Consent Motion to reschedule the Prehearing Conference to allow parties time to complete discovery, and because Employee would be out of the country from June 1, 2017, through July 14, 2017. On April 12, 2017, I issued an Order granting Employee's request and rescheduling the Prehearing Conference for July 28, 2017.

On May 5, 2017, Employee's counsel at the time, Sara Safriet, Esq., withdrew her appearance on behalf of Employee. On June 9, 2017, the undersigned issued an Order rescheduling the Prehearing Conference to August 16, 2017, due to OEA moving to another location on the July 28, 2017 date. On August 14, 2017, Employee's new counsel, William Dansie, Esq., filed a Motion to Reschedule the Prehearing Conference to allow him time to prepare. On August 15, 2017, I issued an Order rescheduling the Prehearing Conference for September 26, 2017. Both parties were present for the Prehearing Conference on September 26, 2017. During that conference, the parties indicated that more time was needed for discovery. As a result, I issued a Post Prehearing Conference Order requiring the parties to complete discovery by November 30, 2017, and scheduled a Status/Prehearing Conference for December 15, 2017.

Both parties appeared for the Status/Prehearing conference. Following the conference, I issued an Order Convening an Evidentiary Hearing for February 27, 2018, and February 28, 2018. The Evidentiary Hearing was held February 27, 2018 and February 28, 2018, where both parties presented testimonial and documentary evidence. Parties were required to submit closing arguments by April 23, 2018. Employee's attorney submitted a withdrawal of his appearance on April 25, 2018. Both parties submitted their closing arguments within the prescribed deadline. The record is now closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the termination was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF TESTIMONY

On February 27, 2018, and February 28, 2018, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

Agency's Case in Chief

Jerome Bizzell ("Bizzell") Tr. Volume I. Pages 21 – 95 & 116 - 133

Bizzell worked for the OAG, Child Support Services Division and served as a Supervisory Support Enforcement Specialist, beginning in June 2013. Bizzell testified that he was the manager of Intake Unit 1 and reported directly to Christine Hart-Wright. Bizzell explained that there were two intake units in the Legal Services section and that he supervised approximately ten Support Enforcement Specialists (SES), including Employee. Bizzell stated that Intake Unit 1 was responsible for processing cases in the child support system, and that this work happens for the District of Columbia and in other jurisdictions. Bizzell testified that the work of the SESs includes obtaining addresses, and determining next steps to move the process for child support. Bizzell explained the work of SES is reviewed by managers and that codes are utilized throughout the process. Bizzell stated that managers will review SESs caseloads on a monthly, quarterly and yearly basis. Bizzell indicated that there were several codes used to indicate where a case is in the process for an order of support and that codes reflect many of the tasks that SESs are responsible for completing.

Bizzell testified that the productivity of an employee is reviewed through the use of the monthly unit report. Bizzell explained that this report shows the activity of individual SES employees. Bizzell further explained that the report shows the number of cases a SES has processed and what codes were applied. Bizzell stated that during Fiscal Year 2014, Employee was assigned as an Interstate SES. In Fiscal Year 2015 (beginning October 2014), he began to have some concerns about the activities of Employee based on what he determined was a significant reduction in the productivity on the monthly report. Bizzell testified that he met with Employee and she explained that she was still working on all of her cases and that she did not indicate at that time that her codes had been deleted. Bizzell explained that reports in March, April, May and June also reflected reduced productivity. Bizzell indicated that he had a subsequent discussion with Employee regarding the reduction in her productivity and to evaluate what the issues were, whether it was training or otherwise. Bizzell cited that there was no change in any procedures or policies with regard to processing cases during this time period. Bizzell explained that he, and his superior Christine Hart Wright, attempted to set up training or review session with Employee to try to identify deficiencies and the reason for change in productivity. Bizzell explained that Employee provided some reasons for the change in productivity, but that following this, there was no improvement in productivity.

Bizzell testified that they involved Ms. Tilley when it was decided to do a formal training session with Employee. The training session included Bizzell, Christine Hart Right and a training coordinator. Bizzell explained that the RSI/RSR policy dated December 18, 2012 was in place when Employee was processing cases in 2014 and 2015.

Bizzell testified that during the formal training that they reviewed specific cases assigned to Employee, but did not go over the 2012 policy. Bizzell explained that following the training, there was still no improvement and Employee was placed on a Performance Improvement Plan (PIP). Bizzell stated that he, Ms. Hart-Wright and Ms. Belinda Tilley developed the PIP for Employee. Bizzell noted that the PIP indicated that the PIP began on November 18, 2015, following a meeting with Employee on November 17, 2015. Bizzell stated that during the November meeting, he, Ms. Hart-Wright, Ms. Tilley, and Nadine Wilburn, and perhaps a representative for Employee were present. They went over the PIP with Employee and what was required for her to complete the PIP. Bizzell explained that the PIP was created to ensure cases were being processed appropriately and correctly entered into the system. Bizzell stated that Ms. Hart-Wright was the "lead" responsible for the development of the PIP.

Bizzell indicated that during the PIP that there were a set of cases to be processed on a weekly basis, and they outlined how each case should be handled. During the PIP time period, Employee's work was monitored on a weekly basis, starting November 17, 2015. Bizzell testified that during a meeting on November 23, 2015, Employee was advised that she was not following correct instructions and would need to be more specific in completing her cases as designated in the PIP. Bizzell explained that during the weekly meeting during the PIP period, they discussed the issues with Employee with regard to her cases. During one meeting, it was noted that Employee had not completed her cases. Bizzell testified that Employee stated that she was working on cases previously assigned to her during the PIP which prevented her from completing the other cases assigned. At this time, Bizzell explained that Employee was told that she had not complied with the PIP. Bizzell recalled a January 2015 meeting with Employee and other Agency individuals. Bizzell testified that the meeting included Union Representatives and the Chief of Staff, Kim Whatley. During this meeting, Whatley indicated that the PIP had been extended and that he and Ms. Hart Wright were instructed to review all of the cases that had been assigned to Employee during the PIP.

Bizzell testified that he was not aware of 8,000 cases that were "in limbo" in 2012. Bizzell explained that he was aware of the Tate case, but did not know any specifics or anything about his signature being forged. Bizzell explained that he was aware of an investigation with regard to the notary and use of notary seals that required the examination of several cases. Bizzell stated that he was not aware about whether cases went to contractors or to Agency employees. Bizzell testified that he received several emails from Employee with regard to her printer and computer screens not being operational. Bizzell explained that due to their location changes, there were problems with logging on and off and obtaining access to certain databases. Bizzell could not recall the number of times this was reported, but noted that it was addressed and was also mentioned in the PIP summary. Bizzell indicated that he was not aware of any of Employee's cases being altered. Bizzell explained that when Employee indicated issues with the computer and printer, it was reported to the IT personnel.

Bizzell testified that workloads vary and that there is no specific quota for employees, but that productivity was measured based on the individual employee's work completed during a particular time period.

Kim Whatley ("Whatley") Tr. Volume I. Pages 96 –110.

Whatley was the Chief of Staff for the Office of the Attorney General from January 2015 to September 2016. Whatley explained that her duties included overall administrative supervision of the entire staff of OAG and direct supervision over the Deputy Attorney General for the Child Support services division. Whatley indicated that in March of 2014, she sent a memo to Employee regarding a disciplinary action that had been proposed against Employee. Whatley explained that when she came on as Chief of Staff in 2015, that disciplinary action against Employee was already pending and that it involved an allegation of insubordination and that an investigation had taken place. Whatley cited that she rescinded the action and counseled Employee about the situation instead.

Whatley testified that she later learned that Employee had been placed on a PIP and that in January 2016; she had a meeting with Employee, union representatives and two levels of supervision for Employee. Whatley indicated that she believed that Employee had requested the meeting. Whatley stated that she reviewed the PIP and told the supervisors to add a column to allow Employee to respond to each summary of her performance under the PIP. Whatley said that the time for the PIP had already elapsed so she extended the time to allow for the modification and give Employee the opportunity for feedback. Whatley testified that it was later determined that Employee was unable to perform her duties as required by her position.

Mari-Christine Hart-Wright ("Hart-Wright") Tr. Volume I. Pages 155 - 196

Hart-Wright worked at the OAG in the Child Support Services Decisions, Legal Services Section. Hart-Wright explained that she was the Assistant Chief of the section and reported directly to Belinda Tilley. Hart-Wright stated that there were two units in the section. Hart-Wright indicated that in 2015, Employee's performance was bought to her attention due to low activity in the reports for Employee's cases. Hart-Wright recalled that when asked about the low numbers, Employee indicated that she was entering the codes, but that someone else must be taking them out of the system. Hart-Wright cited that she contacted the IT department to investigate Employee's claim about the deletion of the codes. Hart-Wright testified that the IT department did a forensic investigation and discovered that the codes were in fact being deleted, but that Employee was deleting them herself. Hart-Wright explained that she told the results to Employee, who cited that she, did not know she had made mistakes and thought what she was doing was required. Hart-Wright stated that Employee indicated that she had not been trained to do interstate cases and so that was why she was having problems processing her cases.

Hart-Wright stated that there was a training done in 2012 with all staff that was presented by the Policy Division and that Employee was a part of that training. Later, Employee was provided with training specifically for her needs. Hart-Wright cited that all employees in attendance to the training had to sign in and that Employee was present on February 13, 2013, as noted by her signature in Agency's Exhibit 14. Hart-Wright testified that in 2015, she and Jerome Bizzell personally trained Employee with regard to the processing of her cases. Hart-Wright explained that later in 2015, it was decided to put Employee on a Performance Improvement Plan (PIP) because her numbers in the monthly reports were significantly lower. Hart-Wright said that they had a meeting with Employee about the numbers and the codes, and that Employee indicated that someone was deleting her codes. Hart-Wright testified that the PIP entailed reviewing Employee's case load and matters that were assigned to her. Hart-Wright explained that the purpose of the PIP was to jumpstart Employee's performance, so she reviewed each task herself and put down the steps that

should be followed for each case. Hart-Wright said that there was a meeting on November 2015 to outline the PIP and review the activities since they had not seen any improvement in Employee's productivity. Hart-Wright explained that she entered the "expected results" column in the PIP in order to measure the results expected from Employee's action on the cases she was assigned during the PIP.

Hart-Wright testified that Employee did not comply with the expected results and did not follow the steps required for the processing of the cases. Hart-Wright explained that Employee cited that she was not trained, or that the cases assigned in the review were not hers and that she shouldn't have to do it. Hart-Wright indicated that overall, Employee was not in compliance with the PIP. Hart-Wright stated that she attended a meeting in January 2016; where the PIP was discussed and it was determined that Employee did not complete 90% of the tasks assigned by the PIP.

Hart-Wright explained that she had known Employee worked in the interstate unit since 2012. Hart-Wright indicated that while there is not a specific number that is measured for case entries to be considered adequate, that they review matters in terms of the overall processing of the case.

Belinda Tilley ("Tilley") Tr. Volume I. Pages 197 - 227

Tilley was employed by OAG as the Legal Services Section Chief and has been with Agency since 2012. Tilley explained that there are two units for intake and that the supervisor for Intake Unit 1 is Jerome Bizzell. Tilley stated that in November 2015, she had a meeting with Employee regarding her performance and PIP. Tilly indicated that Employee's performance had been brought to her attention, due to a lack of productivity as reported in the monthly reports. Tilley stated that Employee's reports showed that she had not processed any petition for some time. Tilley explained that she reviewed and tracked monthly reports for all employees for each fiscal year. Tilley cited that in October and November 2015, Employee's numbers were low; such that it showed that she was productive in the previous year but had little to no productivity in the following year.

Tilley testified that in the development of the PIP, there were two concerns; one was that Employee had refused to interview customers and the other was Employee's accountability for completing her tasks. Tilley indicated that the PIP required Employee to accomplish certain goals and complete tasks to evidence the appropriate processing of the cases. Tilley stated that during the PIP period, weekly meetings were scheduled to discuss performance and that she participated in most of the meetings, whether they were by phone or conducted in person. Tilley iterated that the majority of the meetings did not go well because for the most part, Employee was not complying with the PIP. Tilley stated that during the meetings, it was explained to Employee that she was not doing what she was supposed to do. Tilley also explained that the cases that were assigned to Employee were meant to be the minimum number of cases that any support enforcement specialist would perform during that period.

Tilley cited that there were times during the PIP period where Employee complained about printer failures and issues and difficulty entering her interviews into the calendar. Tilley explained that they were at two different sites and that Employee would complain that she was unable to print or had other computer problems. Tilley also stated that there were days that Employee was out, so the PIP was extended to ensure that Employee had thirty (30) days of a review period. Tilley testified that in January 2016, there was a meeting with Employee, union representatives and other Agency representatives including Ms. Whatley and Nadine Wilburn. Tilley indicated that during that meeting, Employee indicated that management had not given her any credit for work that she had

performed, which is when Ms. Whatley indicated for management to review all the cases to ensure that Employee was given credit and to create a column where Employee could respond to the reviewers' notes. Following this review, it was determined that Employee had failed the PIP and Tilley stated that they had to make a decision of next steps and what the proposed adverse action would be. Ultimately, Tilley explained that termination was the final decision.

Tilley testified that there was a time in 2014 where a suspension was proposed, but after the installation of the new attorney general, amnesty for adverse actions was given, so Employee did not face disciplinary measures at that time. Tilley explained that termination was recommended following this given the egregious nature of Employee's failure on the PIP and low productivity. Tilley stated that she had no involvement with Ms. Christine Davis, the hearing officer in this matter. Tilley cited that there may have been a time in November and December 2015 where Employee did not have access to a phone due to renovations being completed in the suite, but that she could not recall specifically, but stated that there were complaints about phones and other IT issues. Tilley iterated that if a complaint was made, that IT would be dispatched to address the issue. Tilley could not recall a corrective action plan regarding interstate child support cases. Tilley cited that they did have an issue with duplicate cases being assigned to Employee, but stated that they deleted those from the count so that it did not affect the calculation of cases during the PIP period.

Employee's Case-In-Chief

Bonita Barnes ("Barnes") Tr. Volume I. Pages 134 -154

Barnes testified that she has known Employee since 2008 and worked with her during that time. Barnes explained that she and Employee sat across from each other at the office. Barnes indicated that she worked in intake and that Employee was in the interstate unit. Barnes recalled a time where Employee complained about her inability to log into her computer and that her printer was not working. Barnes testified that Employee would say things indicating that her access was not working properly and that something strange was happening with her computer, and that she always had problems accessing certain screens. Barnes explained that she and Employee were coworkers, but that she was unsure of all what was involved in the interstate unit because she worked in the local unit.

Jacquelynne Brown ("Brown") Tr. Volume II. Pages 9 – 32

Brown worked with Employee on child support cases in Virginia and has known Employee for some time. Brown testified that she was involved in an incident regarding the use of a notary and signature in the processing of cases. Brown explained that she used the notary signature of Angela Williams to notarize petitions processed by the office. Brown stated that the petitions were not sent, because the office intervened after she brought it to the attention of management. Brown indicated that she did not know that her actions were illegal at the time she was doing this. Brown testified that in her opinion, Employee was a competent worker, and would sometimes cover her cases if she was out. Brown indicated that she was not aware of a forensic study regarding access codes in Employee's computer.

Brown testified that she worked in the interstate establishment unit and that she was supervised by Jerome Bizzell and Stephanie Perry. Brown indicated that around October 2015 the work volume of cases increased due to an absence of caseworkers, and that she ended up taking on a lot of Employee's cases. Brown cited that Employee complained about being on a PIP and that

others in the office knew she had been places on a PIP. Brown indicated that another case worker was out, but that Employee was there. Brown stated that she had used Ms. Williams's notary equipment while she was out, but did not know that was wrong to do until she was told by management. Brown indicated that management immediately counseled her and that she was told that she was not allowed to do that. Brown stated that none of the cases she notarized had been sent in another jurisdiction and that they pulled cases that were in quality control to ensure that none had left the DC jurisdiction. Brown estimated that during 2015, there were approximately 200 or more petitions that she filed and that she likely did about the same in the 2014 year.

Christopher Tate ("Tate") Tr. Volume II. Pages 43 – 80

Tate testified that he has known Employee since February 2013 when he filed for interstate child support for his two children. Tate stated that his children were born in California and that his divorce and initial custody orders were filed there as well. Tate explained that when he first met Employee he was trying to file for support and that he got very little help at the Agency's office. Tate stated that he finally reached Employee who told him that there was no information about his case. Tate indicated that he also spoke to Ms. Hart-Wright, but that months still went by with no activity on his matter. Tate testified that only Employee was ever responsive to him and that she never misled him while he was trying to figure out the issues with his case. Tate stated that he missed a year of child support to the inaction of Agency. Tate indicated that there was a signature on a document, but that it was forged because he had never signed the document and that he became angry with all the issues at Agency. Tate cited that Employee was a very good worker and that she was the only place in which he found comfort in the office.

Tate also testified that he was never assigned to Employee, but that she was the intake person who took his matter when he first came to the office to seek child support. Tate indicated that Ms. Brown eventually took over this case, and that he met her, but was later unable to reach her on the phone or otherwise. Tate stated that he attempted to reach out to Ms. Brown several times over the months in which he was waiting to hear about his case. Tate cited that he would call Employee to try to reach Ms. Brown, and Employee would explain that she wasn't able to help because she was not assigned to it. A year later, Tate said that Ms. Hart-Wright finally told him that there has been a mistake made with the filing of his support case. Tate explained that Ms. Tilley brushed him off, but that he later wrote a letter to her citing that they should be held responsible for the year of child support that he did not receive. Tate indicated that he thought Employee had his case until he was told otherwise.

Rachel George ("Employee") Tr. Volume II. Pages 81 – 139

Employee cited that she worked at Agency since 1999 with the child support services division. Employee testified that over the years she was a hard worker and put her heart and soul in her work. Employee cited that in 2013, she was moved to the interstate establishment office in Intake Group One. Employee indicated that she was out on FMLA in February 2013 through April 2013 and that after her return the managers treated her differently. Employee testified that on March 12, 2015, she was told that previous charges regarding her work were rescinded. Employee indicated that she sent an email on April 1, 2015, indicating that she needed a transfer because she was not supposed to work in this section and that she was supposed to have been sent back to the audit and program management unit.

Employee explained that she was called in to meet in November 2015, where she was told she was underperforming. She indicated that she was assigned 121 cases, but that neither of her two work stations was connected with the proper printers or the system that she had to use to process her cases. Employee explained that she had a mix of local and interstate cases and that she was not supposed to do local cases. Employee stated that when she was told she as going to be terminated, she found it to be quite surprising because they had not bothered to look at each case and the case notes. Employee also cited that the instructions written by Ms. Hart-Wright, were not relevant to the cases, and that she had never processed any interstate cases, so the instructions she gave were incorrect.

Employee testified that she knew the codes, but they were deleted. She said that Agency was transitioning the system in March 2015. Employee cited that some of her work was not sent to the correct printers and that they were sent to other locations, but that she got a complaint that she was not taking care of her customers. Employee also testified that she was not given a phone at her desk and that she took pictures of the screens where she was having problems. Employee also said that she found that she had been assigned 13 duplicate cases in the caseload that she was assigned. Employee cited that she contacted her manager and IT on a daily basis to notify of the issues with the computer and otherwise. Employee explained that she has been doing this work for many years and that she is thorough with case processing and scheduling and interviewing and filing petitions to get an order. Employee indicated that on December 16, 2015, two IT managers, Melody Moore and Johnathan Mickels, notified her that her access password had been changed. Employee cited that this was not the first time that this had happened to her. Employee testified that the IT managers were investigating the internal programming and why she did not have access to certain screens and why she could not generate forms from the calendar. Employee indicated that they found out that someone had done it, so she told them to send an email to Mr. Pedro and Harold Johnson.

Employee explained that she believe that she was retaliated against because of the Christopher Tate case. Employee testified that in October 2014, that there was an inspection by the Officer of the Inspector General on a large number of cases from DC Superior Court and contractors. Employee cited that she was working on a backlog and it was over 600 cases and that no one else in the unit had a task list like hers. Employee indicated that her other coworkers, Ms. Williams and Ms. Massey, were on limited duty due to health issues. Employee stated that she never got credit for all the work that she did. Employee indicated that from 2013 forward, that there were no monthly reports because they were doing all kinds of cases, and that there was no proper coding for that, so she did not understand why she was considered to be low in productivity. Employee testified that the previous reprimands were based on false charges and that she explained everything in her responses. Employee iterated that the five-day suspension remained in her personnel file after she was told she was not subject to that disciplinary action. Employee said that during the PIP period, she submitted an application for paid family leave on November 13, 2015, and that she requested 320 days intermittently during this time, but during the PIP she only took two (2) days paid leave and three (3) days of an alternate work schedule.

Employee admitted that she was placed on a PIP in November 2015 and that she had several meetings with regard to the PIP. Employee testified that she was called in for training and that she did attend the training. Employee also attested that she attended the meeting in 2016 with Kim Whatley to discuss her PIP, and that union representatives were present. Employee also cited that she did send a letter to Karl Racine discussing her performance during the PIP, but that it was a response letter. Employee testified that she was subject to a wrongful termination and that she was a victim of abuse of power and misinterpretations of the facts.

Summary of Agency's Position

Agency asserts that it had cause to terminate Employee and that it did so in accordance with all applicable laws, rules and regulations. Agency avers that in November 2014, Employee's productivity became of concern for her supervisor, Jerome Bizzell.[2] Specifically, Agency avers that Employee's case productivity significantly decreased and that it continued to decrease into 2015. As a result, on November 17, 2015[3], Agency made the decision to place Employee on a Performance Improvement Plan (PIP).[4] Agency asserts that the PIP was a thirty-day plan implemented to improve Employee's performance. The PIP required Employee to follow written instructions and to perform tasks and process a certain number of cases. Weekly meetings were conducted in order to discuss and review Employee's performance. Agency argues that at each of the weekly meetings during the PIP period that Employee was advised that she was not meeting the requirements of the plan.[5] During the PIP, Agency argues that Employee was tasked to process 10-15 cases a day and that she was provided specific steps to appropriately process these cases.[6]

Agency also argues that at the end of the PIP period, Employee's PIP was extended in order for Employee to complete the cases that were assigned. Specifically, Agency avers that "due to Employee's use of approved leave and problems with her computer, as well as a physical move of CSSD following renovations, the PIP was extended to December 30, 2015 to give Employee a full thirty (30) days to demonstrate her performance in accordance with the PIP."[7] At a meeting held at Employee's request in January 2016, Agency asserts that Employee, members of her union and management were present, where they discussed the PIP and that the Chief of Staff directed that an additional chart be included in the materials so that Employee could respond with regard to the tasks that were assigned, because Employee had complained that her work was not being fully accounted for.[8] Agency argues that during this meeting on January 7, 2016, that "Agency management, Employee and her union representative agreed to a timeline for Employee's receipt of the written results of her performance under the PIP."[9] Agency asserts that Employee did not provide input and that a report was later prepared indicating that Employee's performance had not improved during the PIP and it was recommended that she be terminated.[10] In a written memorandum dated January 19, 2016, Agency avers that it provided Employee with her evaluation and a spreadsheet with regard to her performance under the PIP.

In a notice dated February 24, 2016, Agency issued Employee a thirty (30) day advance notice of a proposal to remove her from her positions "for failing to satisfactorily perform one or more of the duties of her position and any on-duty employment related act or omission that interferes with the efficiency and integrity of government operations. The proposed removal was based on Employee's failure to successfully perform under the PIP."[11]

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[2] Agency's Closing Arguments at Page 1 (April 23, 2018).
[3] There are discrepancies in Agency's filings with regard to the start date of the PIP. In its Answer, Agency asserted that the PIP began on November 17, 2015. In its Closing Arguments, Agency asserts that it began on November 18, 2015. For the purposes of this decision, the undersigned will be relying on the November 17, 2015 date.
[4] *Id.*
[5] *Id.* at Page 3.
[6] Agency's Answer at Page 2 (August 10, 2016).
[7] *Id.*
[8] Agency's Closing Arguments at Page 20.
[9] Agency's Answer at Page 3 (August 10, 2016).
[10] *Id.* at Page 4.
[11] *Id.* at Page 3.

Agency cites that Employee submitted a response on March 14, 2016, and that the Hearing Officer's recommendation was issued on April 11, 2016. On April 20, 2016, the Attorney General sustained the proposal to terminate Employee.[12]

Agency maintains that it terminated Employee appropriately and denies that its actions were in retaliation.[13] Agency argues that pursuant to 6-B DCMR §1605.4(m) (2016), the failure to meet performance standards is a cause that supports adverse action.[14] Further, Agency cites that in accordance with the Table of Illustrative Actions, its penalty of termination was appropriate, because a first offense of failure to meet performance standards is termination. It should be noted that in its Answer, Agency did not assert that its termination was in accordance with this section or version of the DPM, rather it cited to the DPM §1603.3(f) (2012), that the failure to perform fell under the description for neglect of duty. Agency cites in its Answer, that "the advance written notice of proposed removal does not explicitly state Neglect of Duty; however the description of the charge falls under the parameter of the Neglect of Duty charge."[15]

Summary of Employee's Position

Employee avers that she was wrongfully terminated and that Agency did not appropriately following the DPM in its administration of the instant adverse action. Employee avers that Agency's actions were not for cause and that the penalty of termination was unreasonable.[16] Employee also asserts that Agency did not issue a timely decision regarding her performance with the PIP. Employee avers that she did not consent to any extension of any deadlines with regard to the PIP.[17] Employee argues that she should have received written notification by December 28, 2015 (ten days after the original timeline for PIP ended). Employee contends that Agency manipulated and altered records with regard to the instant matter. Further, Employee asserts that Agency failed to follow the DPM when they failed to file her PIP with DCHR. Employee maintains that "OAG was required to be in compliance with the DPM regulations since they have no regulations of their own [and] that OAG violated all aspects of the PIP under Chapter 14 of the DPM."[18]

Further, Employee avers that "there was no neglect of duty or refusal to following instructions" on her part during the PIP period. Employee alleges that the PIP meetings were controversial in nature and that the conduct of management was unprofessional and improper, which created a hostile work environment.[19] Employee argues that she faced ongoing issues with her computer's access screens and printers, and asserts that these obstructions were intentionally created to "fail" her from performing her duties.[20] Employee maintains that she was wrongfully terminated and that Agency has caused her irreparable harm.

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[12] *Id.*
[13] Agency's Closing Arguments at Page 30 (April 23, 2018).
[14] *Id.* at Page 31.
[15] Agency's Answer at Tab 11, Page 1. (Hearing Officer's Report) (August 10, 2016). The
[16] Employee's Petition for Appeal (May 24, 2016).
[17] Employee's Motion to Amend Petition for Appeal at Exhibit 2. (November 11, 2016)
[18] Employee's Closing Argument at Page 13 (April 23, 2018.).
[19] *Id.* at Page 14.
[20] *Id.*

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as a Support Enforcement Specialist (SES). In a Notice of Final Decision dated April 20, 2016, Employee received Agency's decision to remove her from service for failure to satisfy a Performance Improvement Plan (PIP), as outlined in the Advance Notice of Proposed Adverse Action dated February 24, 2016. The effective date of the termination was noted as April 25, 2016.

ANALYSIS

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that *results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee was terminated pursuant to: failure to satisfy a PIP. Agency failed to specify a DPM code provision in its Advance Notice of Proposed Adverse Action (ANPAA) dated February 24, 2016, and in its Final Notice dated April 20, 2016. In its ANPAA, Agency cited that the recommendation for Employee's termination was "based on [Employee's] failure to successfully perform under the PIP."[21] Specifically, Agency indicated that "[t]he cause underlying this proposed disciplinary action is your failure to satisfactorily perform one or more of the duties of your position and any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations."[22] Agency's Final Notice, dated April 25, 2016, cited that "for the reasons stated in the February 24, 2016 Notice of Proposed Adverse Action and the April 11, 2016, Hearing Officer's recommendation exhibits (received by the Office of the Attorney General on April 12, 2016), the proposal to remove you from your position as a Support Enforcement Specialist is sustained."[23]

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[21] Agency's Answer at Advanced Notice of Proposed Adverse Action (August 10, 2016).
[22] *Id.*
[23] *Id.* at Final Notice. As previously noted, Agency has referred to two different DPM versions in its submissions to this office. The record reflects that Agency's Answer cites to the DPM 1603.3 (2012), and in its closing arguments, Agency cites to the DPM 1605 (2016). The undersigned finds that any actions Agency administered in this matter, should have been completed under the DPM 2012 version. Consistent with the findings of the U.S. Supreme Court, OEA has held that there is a presumption in which the "legal effect of one's conduct should be assessed under the

Performance Improvement Plan (PIP)

On November 17, 2015[24], Employee was placed on a PIP due to low productivity. Employee's supervisors noted that Employee's productivity and activity numbers had dropped significantly and decided that a PIP was warranted. The PIP period was November 17, 2015 through December 30, 2015.[25] During the PIP, Employee was expected to "correct deficiencies in the Core Competencies of "Customer Service" and "Accountability." Under "Customer Service", Employee was expected to "schedule and interview customers from her assigned caseload and respond to call for walk-in interviews, as assigned."[26] Under "Accountability" Employee was required to review and process a small number of cases (10-15) each day." Additionally, the PIP provided case specific steps and instructions, policies, procedures, and management directives regarding case processing. Employee was also directed to record her actions and notes for each case by entering them in the child support automated system (DCCSES). Lastly, Employee was to report to management any technical or other difficulties encountered from following the instructions.[27]

Agency asserts that it had weekly meetings with Employee to address the tasks in the PIP and to review Employee's progress. Agency indicated that Employee failed to comply with tasks and that her activity remained low. Agency indicated that Employee failed to enter codes, and also did not conduct interviews as directed. Employee argued that she was not given appropriate training or instruction and had several issues with accessing computer screens and printers, which prevented her from effectively completing her work. Employee also cited that the instructions provided to her for some of the cases were not relevant to the type of cases that were assigned to her. At the end of the PIP period, Agency determined that Employee had not performed well under the PIP, and as a result, Agency proposed to terminate her from service. In a meeting on January 7, 2016, Agency indicated that it extended the PIP period to December 30, 2015, in order to allow for Employee to have a full 30 day review period, given that she was out on leave during the PIP period. Further, Agency cites that during this meeting, which was held at Employee's request that they agreed to extend the time in which Employee would respond and that Agency would also re-review the materials to ensure that Employee was given appropriate credit for work that was completed. On January 19, 2016, Agency issued its memorandum with the results and recommendations from the PIP. Agency avers that Employee had until January 27, 2016 to respond.

Agency argues that Employee's lack of performance warranted the termination and that it followed all appropriate procedures in its administration of the PIP and subsequent termination. Employee avers that Agency failed to follow the guidelines for administering a PIP in accordance with DPM §1400 and that the actions were retaliatory in nature. Specifically, Employee argued that Agency did not adhere with the appropriate timeline provisions set forth in DPM §1410.5, which

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law that existed when the conduct took place." Further, OEA has noted that "the presumption against statutory retroactivity has consistently been explained by a reference to the unfairness of imposing new burdens on people after the fact." The PIP was initiated on Employee in 2015, while the DPM 2012 version was still applicable. As a result, I find that Agency's assertion in its closing argument with regard to the use of the DPM 2016 version to be erroneous.

[24]As previously indicated, there are discrepancies in the record with regard to the start date of the PIP. For the purposes of this decision, the undersigned has relied on the November 17, 2015 date as outlined in Agency's Answer.

[25] Agency cites that it extended the PIP period to address concerns with regard to cases that were reviewed. *See* Agency's Answer at Advance Notice of Proposed Adverse Action. (August 10, 2016).

[26] Agency Answer at Notice of Proposed Adverse Action.

[27] *Id.*

requires that the results of a PIP be submitted in writing to Employee within ten (10) days of the end of the PIP.[28]

In the Hearing Officer's report included with Agency's Answer, Agency argued that because Employee requested the January 7, 2016 meeting which was outside of the PIP process, that Agency granted Employee an opportunity to challenge the "determination of the PIP" by her supervisor. As a result, the hearing officer found that Agency had not violated the ten (10) day notification rule because Employee requested this meeting outside of the DPM Chapter 16 disciplinary process and that this type of review is not incorporated into the DPM Chapter 14 PIP regulations.[29] Agency concluded that Employee could not challenge the ten (10) day rule since she requested the meeting and Agency accommodated her request. The undersigned disagrees with this assertion by Agency. Chapter 14 of the DPM sets forth the guidelines required for the implementation of PIP. Specifically, DPM §§ 1410.1 through 1410.7, provide the manner in which a PIP must be administered. DPM §§1410.5 through 1410.7 states:

> "1410.5 ***Within ten (10) calendar days of the end of the PIP period****, the employee's immediate supervisor or, in the absence of that individual, the reviewer* ***shall make a determination as to whether the employee has met the requirements of the PIP***. If the determination is that the employee has met the requirements of the Performance Improvement Plan, the employee's immediate supervisor, or in the absence of that individual, the reviewer, **shall so inform the employee, in writing**. If the determination is that the employee failed to meet the requirements of the Performance Improvement Plan, the employee's immediate supervisor or in the absence of that individual, the reviewer, as appropriate, **shall issue a written decision to the employee** to:
>
> (a) Extend the Performance Improvement Plan for an additional thirty (30) and not to exceed ninety days total, to further observe the employee's performance;
>
> (b) Reassign, reduce in grade, or remove the employee.
>
> 1410.6 ***Failure on the part of the supervisor, or, in the absence of that individual, the reviewer, to issue a written decision within the specified time period will result in the employee's performance having met the PIP requirements*****.**
>
> 1410.7 Any reduction in grade or termination action as specified in section 1410.5 (b) of this section taken against a Career Service employee shall be taken pursuant to Chapter 16 of these regulations." (Emphasis Added)

The provisions of DPM Chapter 14 indicate that any decision with regard to the PIP, whether it was determined that an employee has successfully or unsuccessfully fulfilled the provisions of a PIP, that written notice *shall* be provided within ten (10) calendar days of the completion of the PIP. Further, the regulation outlines that the failure of Agency to issue written notice will result in the employee's performance having met the PIP requirements. In the instant matter, Employee's PIP period was from November 17, 2015 through December 30, 2015. Consequently, based on the

[28] Employee's Motion to Amend Petition for Appeal (November 11, 2016). It should be noted that Employee argues in this Motion that she never agreed to any extension of deadlines, and that Agency should have notified her of the results of the PIP on or before December 28, 2015.
[29] Agency's Answer at Tab 11 (August 10, 2016).

calculation of ten (10) calendar days, Agency should have submitted its written memorandum on or before January 9, 2016. Agency argues that because Employee requested a meeting that was held on on January 7, 2016, that the request was outside of the DPM 14 PIP provisions and means Employee cannot argue that they failed to comply with the DPM. For the reasons outlined below, the undersigned finds that this argument fails.

The undersigned finds the language of the DPM Chapter 14 to be mandatory in nature. Specifically, DPM §1410.5, indicates that if Agency finds that an employee failed to meet the requirements of the PIP, that it *shall* issue a written decision to employee, within ten (10) calendar days of the completion of the PIP, informing them of results. The regulation provides that Agency is required to give written notification of their decision and can either: (1) extend the PIP for an additional thirty (30) days, not to exceed 90 days in order to further observe employee; or (2) it could submit written notification of the intent to remove employee from service or subject them to a reduction in grade or reassign employee. As a result, I find that because this language is mandatory in nature, that irrespective of Employee's request for a meeting, Agency was required to inform Employee in writing of the results of the PIP on or before January 9, 2016. Assuming *arguendo* that Agency had decided in the January 7, 2016 meeting that Employee had complied and successfully completed the PIP, it still was required to provide that information in writing to Employee by January 9, 2016.

Consequently, I find that regardless of what Agency's decision was with regard to Employee's performance in the PIP, because Agency extended the PIP to December 30, 2015, the regulation mandates that Agency should have submitted written notification to Employee within ten calendar days, which would have been by January 9, 2016. DPM §1410.6 provides that if an Agency fails to "*issue a written decision within the specified time period will result in the employee's performance having met the PIP requirements*." Here, Agency issued its written memorandum with the PIP results to Employee on January 19, 2016. As a result, I find that Agency failed to comply with the provisions of PIP management as required by DPM § 1410.5 and §1410.6, in that it did not issue a decision within ten days of the completion of the PIP, which resulted in Employee having met the requirements of the PIP. Accordingly, I find that Agency failed to follow the applicable laws, rules and regulations with regard to its administration of the PIP, which resulted in Employee having met the requirements of the PIP. Wherefore, I find that Agency did not have cause to terminate Employee from service.

Whether the Penalty was Appropriate

Based on the aforementioned findings, I find that Agency did not appropriately follow the applicable laws, rules, and regulations in its administration of the instant adverse action and as a result, did not have cause for adverse action against Employee. Further, the undersigned finds assuming *arguendo* that there was cause in this matter, that Agency's penalty would not be appropriate. Agency's Advanced Notice of Proposed Adverse Action and its Final Notice, both failed to cite with specificity the DPM provision under which the adverse action penalty was considered. In its Advanced Notice, Agency cited that Employee's termination was subject to her failure to "satisfactorily perform one or more of the duties of your position and *any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations. (Emphasis Added)"*[30] In its Answer, which included the Hearing Officer's

[30] Employee's Petition for Appeal at Advanced Notice of Proposed Adverse Action.

Recommendation, the hearing officer cites that that Advanced Notice "does not explicitly state "Neglect of Duty" however the description falls under the parameter of the Neglect of Duty as outlined in DPM §1603.3 (f)(3).[31] In its closing argument, Agency asserts that Employee's termination was assessed under 6-B DCMR §1607.2 (m) – the failure to meet performance standards."[32] Even assuming that the undersigned had found that Agency had cause for adverse action, which I do not, the lack of specificity with regard to the charges in the Advanced and Final Notices, along with Agency's citations of two *different* versions of the DPM for the adverse action, would lead the undersigned to find that the penalty of termination was not appropriate under the circumstances. Further, the charge for which Employee was terminated was not specified, and the language cited by Agency in its notices covers categories which have different implications for penalties under the DPM. The language that Agency uses in its Advance Notice of, *"any on duty or employment related act or omission that interferes with the efficiency and integrity of government operations,"* includes stipulations for Neglect of Duty and Incompetence, both of which have specifications with regard to the failure to perform duties; and most notably, each of those causes have different penalty implications for first offenses with regard to those charges. For these reasons, and the reasons outlined in this decision, the undersigned finds that the penalty of termination was not appropriate.

ORDER

Based on the foregoing it is hereby **ORDERED that:**

1. Agency's action of terminating Employee from service is hereby **REVERSED.**
2. Agency shall reinstate Employee to her position of record, and Agency shall reimburse employee all pay and benefits lost as a result of her removal.
3. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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MICHELLE R. HARRIS, Esq.
Administrative Judge

[31] Agency's Answer at Tab 11 Page 1 (August 10, 2016).
[32] Agency's Closing Argument at Page 31 (April 23, 2018).